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In The

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-286

JOAN C. THOMASSEN,

v. Petitioner

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN JOSEPH MATONIS
14241 East Imperial
Highway, Suite F
La Mirada, California
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213/943-0711

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

No. _____

JOAN C. THOMASSEN,

Petitioner,

v.

COMMISSIONER OF THE INTERNAL REVENUE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner JOAN C. THOMASSEN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered March 12, 1979 and rehearing denied May 23, 1979, which affirms the June 2, 1979 orders of the United States Tax Court in Los Angeles, California in consolidated cases 5098-72, 5337-73 and 2949-74. Ninth Circuit Docket No. 76-2620.

OPINIONS BELOW

Ninth Circuit. There was no formal opinion rendered by the U.S. Court of Appeals for the Ninth Circuit. The slip opinion Memorandum and judgment entered March 12, 1979 affirming the orders of the Tax Court are set forth in the appendix at A-2. Also set forth in the appendix at A-1 is the denial of the petition for rehearing filed May 23, 1979.

Tax Court. There was no formal opinion in the Tax Court below. The orders of the Tax Court filed June 2, 1979 dismissing the consolidated cases 5098-72, 5337-73 and 2949-74 for lack of prosecution and affirming the Internal Revenue Service tax deficiency determination of taxes, interests and penalties in excess of $315,000 are set forth in the appendix at A-7,A-9,A-11 . The order denying petitioners Motion to Vacate and for Reconsideration of Findings and Conclusions is set forth in the appendix at A-4 .

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on March 12, 1979. A timely petition for rehearing was denied on May 23, 1979. The judgment and denial of rehearing are set forth in the appendix at A-2 and A-1 respectively. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

QUESTION PRESENTED

I. A WIFE, WHO IS NOT AN ATTORNEY, WAS DEPRIVED OF PROPERTY AND DENIED DUE PROCESS OF LAW BY THE TAX COURT'S APPROVAL OF HER HUSBAND, ALSO NOT AN ATTORNEY, AS COUNSEL FOR HER IN A DETERMINATION OF TAX LIABILITY IN TAX COURT.

PRIMARY CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Consitution of the United States, Amendment V:

> No person . . . nor shall be deprived of life, liberty or property, without due process of law;
> . . . .

Title 26, United States Code, Section 7452:

> Representation of parties
> The Secretary or his delegate shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate in the same manner before the Tax Court as he has heretofore beeen represented in proceedings before such Court. The taxpayer shall continue to be represented in accordance with the rules of practice prescribed by the Court. No qualified personal shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.

Title 26, United States Code, Section 7453:

> Rules of practice, procedure, and evidence.
> The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than the rules of evidence) as the Tax Court may prescribe . . . .

Title 28, United States Code, Section 1654:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT OF THE CASE

Elmer H. Thomassen and Joan C. Thomassen were petitioners in the United States Tax Court in consolidated income tax cases 5098-72, 5337-73, and 2949-74. The tax deficiency alleged by the Internal Revenue Service was approximately $315,000 in taxes, penalties and interests for the years 1964 through 1971. The Tax Court considered Elmer and Joan Thomassen as married persons filing jointly except for tax year 1966 when the Court determined that Elmer and Joan Thomassen filed as a married person filing separately.

On October 29, 1974, both petitioners Elmer Thomassen and Joan Thomassen moved the Tax Court for an order allowing Jerome Daly, a disbarred Minnesota lawyer, to "speak for petitioners". (Appendix A-16) This motion was denied on November 4, 1974.

On February 19, 1975, after appearances to obtain continuances of the trial date, Elmer Thomassen appeared in Court without his wife but with Karl Bray, who was not a member of any bar and who is now deceased. Karl Bray purported to represent Mrs. Thomassen, and Dr. Thomassen represented himself in propria persona. Karl Bray's actual words were: ". . . Your honor, Dr. Thomassen has asked me to assist him as co-counsel here today, and he would like to speak for himself in these matters." Tax Court Transcript (TC Tr) of February 18, 1979, p. 3.

Tax Court Judge Tietjens expressed concern about Dr. Thomassen being adequately represented but completely ignored Mrs. Thomassen. On Febuary 18, 1975, Judge

Tietjens said:

> I want to state to Dr. Thomassen that when this case is recalendered by the Chief Judge that he make every effort, which I understand that he is going to make to have counsel retained, to assist him in the preparation of the case, so that the next time that it is calendared, it will either be tried, or dismissed for failure properly to prosecute. (TC Tr, Feb. 18, 1975, p. 11)

At no time did any of the Tax Court judges or Tax Court personnel attempt to point out to Mrs. Thomassen the risk of being represented by one who is not a lawyer in a complex tax matter involving her community property rights of over $315,000 and how those rights would be affected by a Tax Court judgment in favor of the Commissioner and the effect of the attendant assessment and liens on her community property rights in property of the marital community.

On May 13, 1975, Elmer Thomassen appeared in United States Tax Court ". . . Pro Se, for the Petitioners . . . ." (TC Tr, May 13, 1975, p. 2). Elmer Thomassen is an orthopedic surgeon and is not a member of the bar of any court. At the beginning of the proceedings, he had not filed any power of attorney or any authorization showing that he was authorized to represent Joan Thomassen, his wife, in any way. He proceeded to represent her. Later in the proceedings Melvern Stein,Esq., attorney for the respondent, the Commissioner of the Internal Revenue brought up the

issue of Dr. Thomassen's authority to represent his wife. (TC Tr, May 13, 1975, p. 24) Dr. Thomassen told the Court that he was representing his wife and filed a power of attorney, which Judge Sterrett accepted for filing in open court. Karl Bray's name was stricken out and initialed by Mrs. Thomassen. (Appendix A-13) The proceedings continued on May 14, 1975 and Dr. Thomassen again proceeded to represent himself and his wife, stating "Elmer H. Thomassen for the Petitioners." (TC Tr, May 14, 1975, p. 29).

Dr. Thomassen's representation of his wife was grossly inadequate, improper and bizarre. The record shows that petitioners had many opportunities to substantiate deductions and attack Internal Revenue Service allegations of deficiencies, but the record reflects that Elmer Thomassen did not prosecute this case at all but instead made scriptuaral references and challenged the constitutionality of the Tax Court and the Internal Revenue Code. During these proceedings in Tax Court Mrs. Thomassen was absent.

At on time in the proceedings in Tax Court was there a trial on the merits. On June 2, 1979 the Tax Court dismissed the consolidated cases for lack of prosecution and affirmed the tax deficiency determinations of the I.R.S., including taxes, interests and penalties in excess of $315,000. On June 17, 1975, petitioners moved to vacate the orders of June 2, 1975 and for reconsideration of findings and opinion. On November 7, 1975 the motion was denied. The Tax Court granted the petitioners motion to proceed in forma pauperis. Tax Court petitioners timely filed a Notice of Appeal to the Ninth

Circuit Court of Appeals. On March 12, 1979 the Ninth Circuit affirmed the judgments of the Tax Court. Petition for Rehearing was denied and suggestion for a rehearing en banc rejected on May 23, 1979.

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING CONSTITUTIONAL PROBLEMS CONCERNING THE TAX COURT'S POLICY OF CONDONING THE PRACTICE OF HUSBANDS REPRESENTING THEIR WIVES IN TAX COURT AND THEREBY DEPRIVING THE WIVES OF DUE PROCESS OF LAW WITH REGARD TO THEIR PROPERTY RIGHTS.

In a large percentage of the cases in Tax Court husbands represent their wives and this situation is tolerated by the Tax Court judges, depriving wives, in such cases, of due process of law.

Tax Court Judge Tannenwald, at the 1976 American Law Institute-American Bar Association Seminar on tax litigation, estimated that 30-40% of the cases in Tax Court are lay persons themselves without a lawyer. In a large percentage of these cases one spouse represents the other spouse. Presumably husbands represent wives in Tax Court in the overwhelming number of cases where both husband and wife are petitioners. The Court may take judicial notice of the above facts.

The United States Tax Court is the only Court in the United States Federal Court System, with the exception of Justice of the Peace Courts and other courts that are not courts of records, where a person may practice law representing another person without being admitted to the bar of a court in which the proceeding takes place.

Joan C. Thomassen, your petitioner, who is not an attorney, was deprived of property, and denied due process of law

by the Tax Court's approval of her husband, Elmer H. Thomassen, also not an attorney, as counsel for her in a determination of tax liability in Tax Court.

The Tax Court cases in which the wife is a client of her husband, who is not a licensed attorney affects the property rights of the wife and is an improper representation. Almost all of these tax cases involve joint tax liability of the husband and wife. However, in the case at bar, the tax liability for the tax year 1966 was considered separate by the Internal Revenue Service and the Tax Court, and still the Tax Court allowed petitioner's husband, not a licensed attorney, to represent her.

This situation persists today even though it is illegal for a person not a member of the bar to represent another in court. The Tax Court does not even follow its own Rules of Practice which provide that only attorneys or persons admitted to the practice of the Tax Court by examination may practice before the Tax Court. (Please see text of Tax Court Rules of Practice 24 and 200 in the appendix). It is as if the wife's rights do not matter to the Tax Court because the Tax Court allows her to be represented in Tax Court without the protection afforded by the rule that only licensed attorneys or those properly admitted to the Tax Court can practice before the court.

> (A) One who is not admitted to the bar cannot practice law by representing another in any Court unless there is statutory authority for a lay person to represent another.

In the Tax Court below, petitioner Joan C. Thomassen was represented by her husband who was not admitted to practice before the Tax Court. The Tax Court erred in allowing Elmer H. Thomassen, a petitioner in Tax Court, to represent his wife, Joan C. Thomassen, your movant, when he was not a member of the bar of the Tax Court or any Court and was not admitted to practice before the Tax Court, and, therefore Joan Thomassen was deprived of her due process of law because inter alia she was deprived of her California community property rights by the ineffective, inadequate, represhensible and bizarre conduct of her husband.

Title 26, United States Code, Section 7452 and Tax Court Rules, promulgated under 26, U.S.C.§7453, Rule 24 (a)(4) and (b)[1]/ and Rule 200 (a)(1),(2), and (3) of the Tax Court Rules of Practice provide for only three kinds of representation in Tax Court proceedings:

1) representation by an attorney who is admitted to the bar of the Tax Court;
2) qualified persons who are "possessed of the requisite qualifications to represent others in the preparation and trial of cases", even though such persons are not members of any bar; and
3) a person representing himself but no other.

Tax Court Rule of Practice 200 requires that persons who are not attorneys at law file an application, take a written examination, and prove that they are of good moral character. Elmer Thomassen who is not a licensed attorney, was not admitted to practice in Tax Court as a non-attorney

1/ For Tax Court Rules of Practice, Rules 24 and 200, please see Appendix.

under this rule.

The Federal Courts have consistently and repreatedly held that a person who is not a member of the bar legally cannot represent another person: U.S. v. Whitesel, 543 F.2d 1176 (6th Cir. 1976); Algonac Mfg. Co. v. U.S., 458 F.2d 1373 (Ct.Cl. 1972); Guajardo v. Luna, 432 F.2d 1324 (5th Cir. 1970); Ginger v. Cohn, 426 F.2d 1385 (6th Cir. 1970); Russell v. U.S., 308 F.2d 78 (9th Cir. 1962); Rizzo v. Zubrik, 391 F.Supp. 1058 (D.C.N.Y.1975); Hartman v. American Bar Ass'n, 407 F.Supp. 451 (D.C.Pa. 1975); Carden v. Hand, 407 F.Supp. 451 (D.C. Ala. 1975); People ex rel Snead v. Kirkland, 462 F.Supp. 914 (D.C. Pa. 1978); Eddie Turner and Jerome Daly 2/ v. American Bar Association, 407 F.Supp. 451 (W.D.Wis. 1975); Novak v. Beto, 320 F.Supp. 1206 (D.C.Tex. 1970).

Federal and state courts have repeatedly held that unlicensed attorneys may not legally represent other persons even if the one represented is represented by a son, Guajardo v. Luna, supra; City of Downey v. Johnson, 69 Cal.Rptr. 830, 263 Cal.App.2d 775 (1968); brother, Campbell v. Jewish Committee for Personal Service, 271 P.2d 185 (Cal.App. 1954); or husband, City of Chicago v. Witvoet, 299 N.E.2d 128, 12 Ill. App. 3d 654 (1973); Haberkorn v. Sears, Roebuck & Co., 427 P.2d 378, 5 Ariz.App. 397 (1967); National Bank of Austin v. First Wisconsin Nat. Bank of Milwaukee, 10 Ill. Dec. 633, 368 N.E.2d 119 (Ill.App. 1977).

2/ Daly in cases herein is the same Jerome Daly, disbarred attorney, whom Elmer Thomassen and Joan Thomassen wanted as counsel in their Tax Court motion of 10/29/74.

The property right guarantees and the equal protection guarantees of the due process clause of the Fifth Amendment are violated when a wife's community property rights are adversely affected by the Tax Court's actions in allowing the wife to be represented by an unlicensed attorney, in this case, her husband. Other Federal Courts and State Courts are diligent, indeed adament in protecting lay persons from unqualified unlicensed attorneys. These courts will not allow an unlicensed attorney to represent another in court even if the unlicensed attorney is a member of the family of the one sought to be represented. In the United States Tax Court, a person who is not admitted to practice before that court may not appear for another. Please see Tax Court Rules of Practice (Appendix) But in practice there is one improper exception to that rule: husbands can represent wives, when they have filed jointly as married persons. However, not even this curious and improper practice was followed in the Tax Court proceedings with respect to the tax year 1966. The Internal Revenue Service and the Tax Court deemed Joan Thomassen to have filed separately for tax year 1966 and still allowed Elmer Thomassen, an unlicensed attorney, to represent his wife. Please see Tax Court Order of June 2, 1975 (Appendix A-7)

In Black and White Operating Co. v. Grosbart, 511 A. 630, 107 N.J. Law 63 (1930), the only exception to the rule that a person must be a member of the bar to have an audience in court representing another is in the case of infants. The United States Tax Court treated Joan C. Thomassen as an infant, i.e. a non-person.

This is in violations of her basic right to be treated before the law as an individual and not just a married woman in a family where the important decisions, such as those involving tax liabilities, are made by the husband. The government cannot consider Elmer Thomassen "Lord and Master of his House" so that he speaks for his wife jeopardizing her community property rights and other rights.

(B) The Tax Court had an affirmative duty to protect the interests of Joan C. Thomassen from the ravages of an unqualified self-made pro per attorney.

The affirmative duty of a court to so protect a lay person is established: U.S. v. Whitesel, supra; U.S. v. Sacco, 563 F. 2d 552(2d Cir. 1977), cert den'd 98 S.Ct. 779, 434 U.S. 1039, 54 L.Ed.2d 789. In U.S. v. Whitesel, supra, the United States Court of Appeals for the Sixth Circuit said that district courts should require, as a minimum requirement, a showing that the unlicensed attorney was sufficiently learned in the law to adequately represent his client in court. It is obvious from the record that Elmer H. Thomassen is wholly incapable of representing anyone in court and no attempt was made by the Tax Court to determine what, if anything, he knew about substantive and adjective law. The Tax Court judges knew that Elmer Thomassen was not a member of the bar,they knew he had an abjext lack of understanding about the law, taxes and procedural rules and they had ample

opportunity to observe Elmer Thomassen's conduct which was destructive of Joan Thomassen's California community property interests.

(C) The purpose of the Rule against unlicensed attorneys appearing in court to represent another is for the protection of the public including the litigant whom the unlicensed attorney attempts to represent.

One of the leading cases in this area involved the best selling book, How to Avoid Probate by Norman F. Dacey, an insurance agent who was not an attorney,is Norman F. Dacey v. New York County Lawyer's Ass'n, 290 F. Supp. 835 (.S.D.N.Y. 1968). Dacey sued the New York County Lawyer's Ass'n for damages arising out of the bar associations's successful law suit adjudging Dacey in contempt of court for the unlawful practice of law. In that case the criminal law making the unauthorized practice of law a crime was justified as a measure to protect citizens against the dangers of court representation by persons trained, examined or licensed to practice law.

The purpose of the requirement that only licensed members of the bar may represent others in court is to protect the public from the evils occasioned by unqualified persons performing legal services. The Supreme Court of Minnesota characterized the evils occasioned by the practice of law by unlicensed attorneys as "intolerable". Gardner v. Conway 48 N.W.2d 788 (Minn. 1951).A Georgie court said that

the prohibition against the unauthorized practice of law was to protect the public against exploitation by incompetent and unqualified practitioners. Lowe v. Presley, 71 S.E. 2d 730, 86 Ga.App.328 (Ga.App.1952).

Allowing unqualified unlicensed attorneys to represent individuals in court and to practice law is an evil because it endangers property rights and interferes with the proper administration of justice. Bar Ass'n of Tenn., Inc. v. Union Planters Title Guaranty Co., 326 S.W. 2d 767 (Tenn. App. 1959). In the case at bar and in the Tax Court, the Court in which the assessment was made which is the basis of this collection law suit, it is obvious that non-lawyer Elmer H. Thomassen has interfered with the proper administration of justice. It is likewise obvious that the property rights of his wife, Joan C. Thomassen, are endangered by his unqualified, and improper representation of her in the Tax Court.

(D) One who is not admitted to the bar cannot represent another as an agent or attorney-in-fact.

The government cannot claim that Elmer Thomassen was acting as an agent or attorney-in-fact for his wife Joan Thomassen. The courts have uniformly held that an unlicensed lawyer cannot represent another by merely filing a power of attorney in which he is authorized to act as an agent or attorney in fact.

7 C.J.S. Attorney & Client §16, pp. 724-725 states "In the absence of constitutional or statutory authority, a person who has not been admitted as an attorney cannot practice law, as by representing a client, in a court of record, either as an attorney or as an agent of his client." (citations omitted). The courts have uniformly held that authorization of an unlicensed attorney to represent the principal as an agent or attorney in fact. Rizzo v. Zubrik, supra; Ginger v. Cohn, supra; Leonard v. Walsh, 220 N.E. 2d 57, 73 Ill. App. 2d 45 (1966); People By and Through Dept. of Public Works v. Malone, 42 Cal. Rptr. 888 (Cal. App. 1965); Collins v. O'Brien, 208 F.2d 44, 93 U.S. App.D.C. 192 (1953) cert. den'd 347 U.S. 944, reh'g den'd 347 U.S. 970.

(E) Because there is no privilege to be represented in Court by one who is not a member of the bar, there can be no waiver by litigant of the protection of the Court from unlicensed attorneys.

Defendant, Joan C. Thomassen, anticipates the government's argument that she has waived her right to be protected by the Tax Court by her acquiescence in her husband's representation of her. However, this right cannot be waived. As argued supra, the purpose of the rule against unlicensed practitioners representing persons in court is to protect the public from the consequences of the unlicensed practitioners lack of training, experience and knowledge. 28 U.S.C.§1654 provides for the right of parties to ". . . plead their own cases personally or by counsel..." but does not grant a right to a party to be represented by a non-licensed attorney.

The Court knows full well that it would not allow an individual to come into court and waive the court's protection from unlicensed attorneys, thereby allowing an unlicensed attorney to appear representing the litigant. In the Tax Court, Elmer H. Thomassen and Joan Thomassen filed a motion to allow Jerome Daly, a disbarred attorney, to represent them and this motion was denied. (Motion filed October 29, 1974, denied November 4, 1974). As far as Joan Thomassen is concerned, Jerome Daly would have been a far better advocate than her husband. At least Jerome Daly went to law school and practiced law for many years before he was disbarred.

II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS AFFIRMING THE TAX COURT BELOW IN CONDONING THE REPRESENTATION OF A SPOUSE BY HER HUSBAND, WHO IS NOT ADMITTED TO THE BAR OF ANY COURT, IS IN CONFLICT WITH FEDERAL STATUTES, THE U.S. CONSTITUTION, OTHER U.S. COURTS OF APPEALS AND EVEN THE TAX COURT'S OWN RULES OF PRACTICE.

The decision of the Ninth Circuit Court of Appeals (Appendix A-2) to affirm the Tax Court in the proceedings below, wherein the Tax Court condoned the representation of the petitioner Joan C. Thomassen by her husband Elmer H. Thomassen, is in direct conflict with the policies underlying 28 U.S.C.§1654, 26 U.S.C.§7452, the Tax Court Rules of Practice promulgated under 26 U.S.C.§7453 (Rules 24 and 200) and it violates the equal protection guarantees of the due process clause of the Fifth Amendment.

The federal statutes do not permit a person who is not a licensed attorney to represent another person in Court. 28 U.S.C.§1654 specifically states that parties may appear in court through counsel or pro se. 26 U.S.C.§7452 and §7453 state that representation shall be governed by the Rules of the Tax Court. The Tax Court Rules of Practice, Rules 24 and 200 (Appendix A-17)permit only attorneys and other persons admitted to the practice of the Court pursuant to the qualifications of Rule 200 to practice before Tax Court.

Other Circuit Courts have consistantly held that an unlicensed attorney may not represent another person in court. U.S. v Whitesel, supra (6th Cir. 1976); Algonac Mfg. Co. v. U.S., supra (Ct.Cl.1972); Guajardo v. Luna, supra (5th Cir. 1970); Ginger v. Cohn, supra (6th Cir. 1970). Even the Ninth Circuit in Russell v. U.S., supra (1962) held that a federal prisoner appearing in propria persona could not represent another federal prisoner confined at another institution. In the instant case the Ninth Circuit did not object to a husband representing a wife in Tax Court. It is curious that the Tax Court in Los Angeles, California (where the proceedings below took place) condons husbands representing their wives in Tax Court, whereas both the U.S. District Court for the Central District of California and Southern District of California have Local Court Rules specifically prohibitting the representation of wives by their husbands in court. Central District: Local Rule 1.9; Southern District: Local Rule 110-13.

Permitting husbands to represent their wives in Tax Court, without requiring them

to first be admitted to the practice of the Tax Court, is a violation of the equal protection guarantees of the due process clause of the Fifth Amendment. As discussed earlier in Reason I(B), the Court has an affirmative duty to protect the public from the inherent dangers of representation in court by unqualified, unlicensed persons. The wives of husbands in Tax Court are entitled to no less a right to the protection of the Court than any other individual before Tax Court and the Tax Court prejudiced the petition of Mrs. Thomassen by condoning representation by her husband.

III. IT IS WITHIN THE SUPERVISORY POWER OF THE SUPREME COURT TO CORRECT LOWER FEDERAL COURT PRACTICES AND POLICIES WHICH VIOLATE THE RIGHTS OF TAXPAYERS AND IMPEDE THE ORDERLY ADMINISTRATION OF JUSTICE.

The Supreme Court has supervisory powers over the other federal courts. Art. 1, § 1 of the Constitution of the United States. Not only are personal rights and property affected by unqualified, unlicensed attorneys practicing in court, but also the orderly administration of justice is adversely affected.

> (A) The Supreme Court has the power to review a decision even though a specific objection was not raised in Tax Court.

Even though the petitioner Joan C. Thomassen did not raise an objection to her husband's representation of her in Tax Court and was not aware that such

representation was improper according to Tax Court Rules, that should not prevent the Supreme Court from preventing a miscarriage of justice. In Hormel v. Helvering, 312 U.S. 552,557 (1941) this Court in reversing a tax case stated that

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

In Hormel v. Helvering, Ibid, this Court affirmed the judgment of the lower court reversing the decision of the Board of Tax Appeals for further proceedings at the request of the Internal Revenue Service. There the Court gave the I.R.S. a second chance at presenting a prima facie case in Tax Court. Please see also U.S. v. Smith, 437 F.2d 538, where the court held that where the government had failed to present a prima facie case, it may have a second chance if it would be "just under the circumstances" to do so. Surely if the government is to be accorded this consideration, no less is due a taxpayer who has never had her day in court to present her case on the merits because the Tax Court permitted her husband to represent her in Tax Court, contrary to its own Rules.

The rationale used by the Supreme Court in Hormel v. Helvering to justify reversing a Board of Tax Appeals decision in favor of the taxpayer and remanding it for further proceedings applies equally to the instant case:

> "...this is exactly the type of case where application of general practice would defeat rather than promote the ends of justice, and the court below was right in so holding." Ibid at 560.

The Supreme Court should exercise its supervisory powers over the Tax Court in the case herein, specially since the Tax Court is repeatedly violating its own Rules of Practice by permitting husgands to represent wives in Tax Court, not warning the spouse of the inherent dangers and thus depriving those spouses of their property rights without due process of law.

> (B) A judgment in a case where a litigant was represented by one who was not a member of the bar is void and should be considered a nullity.

The Orders of June 2, 1975 (Appendix)determining that the I.R.S. deficiency assessment of over $315,000 was correct is void because peititoner Joan C. Thomassen was represented by an unlicensed lawyer and the Court condoned this practice. 7 C.J.S. Attorney & Client §16(b), p. 725 states: "Proceedings in a suit by a person not entitled to practice are a nullity, and the suit may be dismissed. If the cause has proceeded to

judgment, the judgment is void and will be reversed." (citations omitted).

It has been uniformly held that a judgment of a court in which a party was represented by an unlicensed attorney is void. State ex rel. Mather v. Carnes, 551 S.W.2d 272 (Mo.App. 1977); City of Downey v. Johnson, supra; Ebeling v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 77 Cal.Rptr. 612 (Cal.App.1969); In re Collins' Estate, 73 Cal.Rptr. 599 (Cal.App. 1968); Leonard v. Walsh, supra; Colton v. Oshrin, 278 N.Y.S. 146, 155 Misc. 383 (Sup. 1935).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and Memorandum of the Ninth Circuit.

JOHN JOSEPH MATONIS, ESQ.
14241 East Imperial Highway
Suite F, La Mirada, Cal.90638
213/943-0711

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, three copies of the Petition for Writ of Certiorari were mailed by me, postage prepaid, to Gilbert E. Andrews, Esq. Tax Division, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent.

Robert G. Costantinou
1399 Ninth Avenue, Ste. 611
San Diego, Calif. 92101

Filed May 23,1979
Emil E. Melfi,Jr.
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELMER H. THOMASSEN and
JOAN C. THOMASSEN,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE)

Respondent,Appellee.

No.76-2620

O R D E R

Before: HUFSTEDLER and TRASK,Circuit Judges, and Mc NICHOLS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Trask have voted to reject the suggestion for rehearing en banc. Judge Mc Nichols recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Ray Mc Nichols, Chief Judge, United States District Court, District of Idaho, sitting by designation.

Filed May 12, 1979
Emil E. Melfi, Jr.
Clerk, U.S.Court
of Appeals

UNITED TATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELMER H. THOMASSEN and JOAN C. THOMASSEN, Petitioners-Appellants	)	No. 76-2620
v.	)	MEMORANDUM
Commissioner of Internal Revenue, Respondent-Appellee.	)	

Appeal from the United States Tax Court

Before: HUFSTEDLER and TRASK, Circuit Judges, and McNichols,* District Judge.

Appellants' motion for leave to file their supplementary opening brief is granted.

Appellants seek both reversal of the Tax Court's orders dismissing these cases and vacation and remand of the cases to the Tax Court to permit the taxpayers to produce evidence on the merits of the litigation. The Commissioner determined deficiencies in the income taxes of the taxpayers for the years 1964 through 1971, as a result of disallowing claimed business, rental, and farming expenses. Deficiency notices were accordingly issued. There-

*Hon. Ray McNichols, Chief Judge, Unites States District Court, District of Idaho, sitting by designation.

after the taxpayers filed repeated petitions in the Tax Court, non e of which, save one, ever reached the merits of the tax deficiency determinations. Instead, the petitions relied upon the claimed invalidity of the income tax laws upon constitutional grounds that have been frequently held legally frivolous. The Tax Court again and again gave taxpayers another chance to present evidence on the merits.

On the single occasion in which taxpayers resorted to counsel, the taxpayers disregarded his advice and the lawyer withdrew from the case. Not until the night before trial, did the taxpayers contact another lawyer, who sought and obtained a continuance to permit him to examine the taxpayers' books and records.

The dilatory tactics of the taxpayers did not end in the Tax Court. They failed to perfect their appeal; we dismissed the appeal by reason of their defaults, Thereafter, this court also relieved them of their defaults, and gave them an opportunity to present the appeal. When they filed their briefs, the arguments presented for our consideration were also legally frivolous, At the last moment, counsel was retained and counsel has made a valiant effort to relieve them from their multiple litigation errors.

We accept applellate counsel's assurance that the taxpayers are now ready to cooperate with the Government, Unfortunately for the taxpayers, however, their decision to operate within the system comes too late. We have conscientiously examined the full record, and we are unanimously of the opinion that there exists neither any legal nor equitable basis to vacate the dismissals entered by the Tax Court.

AFFIRMED.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ELMER H. THOMASSEN AND JOAN C. THOMASSE, ET AL. Petitioner	)	Docket No.
	)	5098-72
v.	)	5337-73
	)	2949-74
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

On October 28, 1975 the Court received the following documents from petitioners (1) a document entitled "Discharge of Attorney and Substitution of E. H. Thomassen, M.D. in Propria Persona", (2) a "Notice of Appeal", in which petitioners give notice of their intent to appeal orders of dismissal and decision entered in these cases on June 2, 1975 and, (3) a document entitled "Notice of Motion and Motion for Leave so to Proceed in Forma Pauperis in Appeal from Tax Court". A review of the Court's official files in these cases discloses that an order of dismissal and decision was entered in each of these cases on June 2, 1975. On June 17, 1975 counsel for petitioners timely filed pursuant to Rule 162, Tax Court's Rules of Practice, a "Motion to Vacate Order of Dismissal" in each of these cases. On June 27, 1975 said counsel filed a "Motion for Reconsideration of Finding and Opinion". On July 8, 1975 counsel for respondent filed in each of these cases a "Notice of Objection to MOtion to Vacate Order of Dismissal and to Motion for Reconsideration of Findings and Opinion".

On August 4,1975 petitioners' counsel filed a "Declaration in Support of Motion to Vacate Order of Dismissal and to Move for Reconsideration of Finding and Opinion". On July 28, 1975 an order was served upon counsel for the parties in which petitioners' "Motion for Reconsideration of Finding and Opinion" filed in each case on June 27, 1975 was denied. No action has been taken to date upon petitioners Motion to Vacate Order of Dismissal filed in each of these cases on June 17, 1975.

On August 11, 1975 the Court received from petitioner Elmer H. Thomassen a document entitled "Affidavit of Petitioner Elmer H. Thomassen in Support of Motion to Vacate Order of Dismissal." The Clerk of the Court is hereby directed to filed that document as of this date and he is to serve a copy thereof upon counsel for respondent together with a copy of this order. After due consideration and based upon the record in each of these cases in its entirety, it is

ORDERED that petitioners' Motion to Vacate Order of Dismissal filed in each of these cases on June 17, 1975 is hereby denied. It is further

ORDERED that the Clerk of the Court is hereby directed to file the aforesaid document entitled Discharge of Attorney and Substitution of E. H. Thomassen, M.D. in Propria Persona in each of these cases as of the date received, October 28, 1975, as a motion to withdraw counsel of record and that motion is herewith granted and Melvin L. Firedland, Esq., is hereby withdrawn as counsel of record in each of these cases.

Since the aforesaid Notice of Appeal and Notice of Motion and Motion for Leave so to Proceed in Forma Pauperis in Appeal from the Tax Court were received by the Court prior to the Court's taking action on the aforesaid Motion to Vacate Order of Dismissal filed in each of these cases on June 17, 1975 those documents were premature on the date received. However, since its petitioners' stated intent to appeal from the order of dismissal and decision will act upon those docuements by separate order dated subsequent to this date.

/s/ Samuel B. Sterret
Judge

Dated: Washington D.C.
November 7, 1975

UNITED STATES TAX COURT

Washington

ELMER H. THOMASSEN & JOAN C. THOMASSEN, Petitioner	)	
v.	)	DOCKET NO. 5098-72
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trail session of the Court at Los Angeles, California on May 12, 13, and 14, 1975, pursuant to notice. Petitioner Elmer H. Thomassen, having appeared, filed with the Court on May 12th, a Power of Attorney for his wife, Petitioner Joan C. Thomassen. At the recall of the case on May 14, 1975, Petitioner Elmer H.Thomassen stated that he could not proceed due to the fact that he was unable to prepare properly his books and records and that he preferred to stand on his constitutional rights. Cou-sel for the Respondent moved the Court to dismiss this case and enter a decision for the Respondent. After due consideration of the long history of this matter and for cause appearing in the transcript of the proceeding this date, it is

ORDERED, that REspondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED: That there are deficiencies in income tax, together with additions to the tax due from the Petitioners,

Elmer H. Thomassen and Joan C. Thomassen for the taxable years ended December 31, 1964, 1965, 1967, and 1968 as follows:

ADDITIONS TO THE TAX
I.R.C. of 1954

Year	Income Tax	Section 6653(a)
1964	$19,553.39	$997.67
1965	$29,614.49	$1,480.72
1967	$28,342.24	$1,417.11
1968	$37,089.00	$1,854.00

Further, that there is a deficiency in income tax, together with additions to the tax due from the petitioner

SERVED JUNE 2, 1975

Joan C. Thomassen for the taxable year ended December 31, 1966, as follows:

ADDITIONS TO TAX
I.R.C. of 1954

Year	Income Tax	Section 6651(a)	Section 6653(
1966	$12,453.10	$3,113.27	$622.65

Further, that there are deficiencies in income tax together with additions to the tax due from the Petitioner Elmer H. Thomassen for the taxable year ended December 31, 1966, as follows:

ADDITIONS TO TAX
I.R.C. of 1954

Year	Income Tax	Section 6651(a)	Section 6653(
1966	$12,859.00	$3,214.75	$642.95

Entered Jun 2, 1975/s/
Judge

UNITED STATES TAX COURT
WASHINGTON,D.C.20217

ELMER H. & JOAN C. THOMASSEN Petitioner,	)	
	)	Docket No.
v.	)	5337-73
	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	
	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trial session of the Court at Los Angeles, California on May 12, 13 & 14, 1975, pursuant to notice. Petitioner Elmer H. Thomassen, having appeared, filed with the Court on May 12, 1975, a Power of Attorney for his wife, Petitioner Joan C. Thomassen. At the recall of the case on May 14, 1975, Petitioner,Elmer H. Thomassen stated that he was unable to prepare properly his books and records and and that he preferred to stand on his constitutional rights. Counsel for the Respondent moved the Court to dismiss this case and enter a decision for the Respondent. After due consideration of the long history of this matter and for cause appearing in the transcript of the proceedings, it is

ORDERED, that Respondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED AND DECIDED: That there are deficiencies in income tax, together with additions to the tax, due from Petitioners Elmer H. Thomassen and Joan C. Thomassen

for the taxable year ended Dycember 31, 1969 as follows:

	ADDITIONS TO THE TAX - IRC. of 1954	
Year	Income Tax	Section 6653(a)
1969	$49,484.00	$2,474.00

/s/ Samuel B. Sterrett
JUDGE

Entered June 2, 1975
Enter:

Served June 2,1975

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ELMER H. THOMASSEN & JOAN M. THOMASSEN, Petitioner,	)	Docket No. 2949-74
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the trial session of the Court at Los Angeles, California on Mayl2, 13, &14, 1975, pursuant to notice. Petitioner Elmer H. Thomassen, having appeared, filed with the Court on May 12, 1975, a Power of Attorney for his wife, Petitioner Joan M. Thomassen. At the recall of the case on May 14, 1975, Petitioner, Elmer H. Thomassen stated that he was unable to prepare properly his books and records and that he preferred to stand on his constitutional rights. Counsel for the Respondent moved the Court to dismiss the case and enter a decision for the Respondent. After due consideration of the long history of this matter and for cause appearing in the transcript of the proceedings, it is

ORDERED, that Respondent's motion is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED: That there are deficiencies in income tax, together with additions to the tax due from the

Petitioners Elmer H. Thomassen and Joan M. Thomassen for the taxable year ended December 31, 1970 as follows:

	ADDITIONS TO THE TAX I.R.C. OF 1954	
Year	Income Tax	Section 6653(a)
1970	$56,970.00	$2,849.49

Further, that there is a deficiency in income tax, together with additions to the tax, due from the Petitioner Joan M. Thomassen, for the taxable year ended December 31, 1971, as follows:

	ADDITIONS TO THE TAX I.R.C. of 1954		
Year	Income tax	§6651(a)	§6653(a)
1971	$19,255.80	$4,813.95	$962.79

§6654
$616.19

Further, that there is a deficiency in income tax, together with additions to the tax, due from the Petitioner Elmer H. Thomassen for the taxable year ended December 31, 1971 as follows:

	ADDITIONS TO THE TAX I.R.C. OF 1954		
Year	Income Tax	§6651(a)	§6653(a)
1971	$19,841.00	$4,960.00	$992.05

§6654
$634.91

Entered
June 2, 1975

/s/ Samuel B. Sterrett
Judge

DKT.NO 5337-73

POWER OF ATTORNEY

U.S. Tax Court
Filed at
Los Angeles
May 12, 1975

KNOW ALL MEN BY THESE PRESENTS, that

/s/ Joan Thomassen has made, constituted and appointed, and by THESE PRESENTS, does
E.H.Thomassen /s/J.T.5/13/75
make, constitute and appoint ~~KARL J. BRAY~~ true and lawful ATTORNEY for him and in his name, place and stead, to compile, sign and file any and all proper court documents;
E.H.Thomassen
giving and granting unto ~~KARL J. BRAY~~ full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in any and all court proceedings pertaining to
/s/
said Income Tax years 1964 thru 197 as fully to all intents and purposes, as
/s/ I might or could do if personally present, with full power of substitution and revocation hereby ratifying and confirming all that said Attorney or Attorney Substitute shall lawfully do or

cause to be done by virtue hereof.

IN WITNESS WHEREOF, _____

has hereunto set his hand and seal the _____

___ ___day of _____, in the one

thousand nine hundred and _____

year of our Lord.

SEALED AND DELIVERED IN THE PRESENCE OF:

/s/E.H. Thomassen,M.D.)
~~KARL J. BRAY~~)
/s/ Joan Thomassen)
_____)
WITNESS)

STATE OF /s/ California)
) SS
COUNTY OF /s/ San Bernardino)

Be it known that on this 13 day of May ,one thousand nine hundred seventy five, before me, a Notary Public in and for said County, personally appeared Joan Thomassen , above named, who is to me known to be the person described in and who executed the above Power of Attorney, and acknowledged the same to be his free act and deed.

/s/Carmen L. Ramas
Notary Public, County of San Bernardino
State of California

My Commission expires March 7, 1976

(Official Seal)

(COPY) Filed
Oct.29,1974

Tax court
Mail room UNITED STATES TAX COURT

Docket No.5337-73

Denied
Nov. 4, 1974

ELMER H. THOMASSEN and
JOAN C. THOMASSEN,
Petitioners

vs.

C. Donald Alexander,
Commissioner of Internal Revenue,

Respondent.

MOTION AND NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPOINT A SPOKESMAN AND AGENT AND MOTION FOR A TRIAL BY JURY.

To: The Judges of the Tax Court of the United States and Jonathan A. Brod, Attorney for Respondent

Whereas, the undersigned Petitioners do hereby appoint Jerome Daly, next of friend, as his agent and spokesman to speak for Petitioners at their direction and pleasure while the undersigned are peaceably assembled to Petition the U.S. Tax Court, a part of the executive, branch, for a redress of grivances pursuant to their rights as securred by the 1st, 4th, 5th, and 9th Amendments to the Constitution of the United States;. . . . . .

* * * * * * * * *

/s/Elmer H. Thomassen
Dated Oct.19,1974 Elmer H. Thomassen

/s/ Joan C. Thomassen
Joan C. Thomassen

THE TAX COURT RULES OF PRACTICE.

Rule 24(a)(4)
Counsel not admitted to practice. No entry of appearance by counsel not admitted before this Court will be effective until he shall have been admitted, but he may be recognized as counsel in a pending case to the extent permitted by the Court and then only where it appears that he can and will be promptly admitted. For the procedure for admission to practice before the Court, see Rule 200.

Rule 24 (b)
Personal representation without counsel. In the absence of appearance by counsel, a party will be deemed to appear for himself. An individual party may represent himself. A corporation or an unincorporated association may be represented by an authorized officer of the corporation or by an authorized member of the association. An estate or trust may be represented by a fiduciary thereof....

Rule 200(a) (1), (2) and (3)
(a) Qualifications. (1) General. An applicant for admission to practice before the Court must establish to the satisfaction of the Court that he is a citizen of the United States, of good moral character and repute, and is possessed of the requisite qualifications to represent others in the preparation and trial of cases. In addition, the applicant must satisfy the further requirements of this Rule 200.

(2) Attorneys. An attorney at law may be admitted to practice upon filing with the

Admissions Clerk a completed application accompanied by a fee of $10 and a current certificate from the Clerk of the appropriate court, showing that the applicant has been admitted to practice before and is a member in good standing of the bar of the Supreme Court of the United States, or of the highest or appropriate court of any State, or Territory, or of the District of Columbia. A current court certificate is one executed within 60 calendar days preceding the date of the filing of the application.

(3) Other applicants.
An applicant, not an attorney at law, must file with the Admissions Clerk a completed application accompanied by a fee of $10. In addition, such an applicant, as a condition of being admitted to practice, must give evidence of his qualifications satisfactory to the Court by means of a written examination given by the Court, and the Court may require such person, in addition to give similar evidence by means of an oral examination.....

Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

Nos. 79-286 and 79-290

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOAN C. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ELMER H. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-286

JOAN C. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 79-290

ELMER H. THOMASSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners[1] seek review of the decision below upholding the Tax Court's dismissal of their suits for redetermination of income tax deficiencies because of their failure to prosecute them.

---

[1]Joan Thomassen is a party because she filed joint income tax returns with her husband for all years except 1966. The Tax Court issued consolidated opinions with respect to both petitioners. Elmer Thomassen and Joan Thomassen have filed separate petitions for certiorari. Since the facts and legal issues are the same with respect to both petitioners, we are responding in this single memorandum in opposition.

The pertinent facts are undisputed and may be summarized as follows: Petitioners commenced these actions in the Tax Court for redetermination of income tax deficiencies, penalties and interest for the period 1964-1971. They filed seven petitions and amended petitions. Six of these pleadings merely alleged generally that the income tax was unconstitutional; that the deficiency determinations were contrary to the teachings of the Bible, that the burden of proof was on the government, or that the taxpayers owed no tax (R. 1, 53, 116, 163, 208, 369, 380, 392).[2] The single petition that addressed the issues was prepared in 1972 by an attorney retained by petitioners following the dismissal of their third amended petition. Upon entry into the case, this attorney filed a motion to vacate the order of dismissal. Attached to the motion was an affidavit of petitioner Joan Thomassen in which she alleged, *inter alia*, that neither she nor her husband had any training in accounting, law or taxation and that they had relied on nonprofessional advice in preparing their petition and amended petitions, "not realizing fully the burden of proof to be met by said Petition and the complexities of draftmanship inherent in said feat" (R. 152, 155-157, 163). The Tax Court thereupon vacated its order of dismissal and petitioner's counsel filed an amended petition (R. 162, 163-172). Subsequently, petitioners filed petitions and amended petitions for later years, without assistance of counsel, in which they reverted to their earlier constitutional, Biblical and burden of proof arguments. In the end, petitioners' counsel withdrew from the case because his advice was disregarded (R. 366).

[2] "R." refers to the record appendix in the court of appeals.

Throughout the proceedings, the Tax Court carefully explained to petitioners the requisite contents of a petition and urged them to make their books and records available to the Internal Revenue Service so that the cases could be made ready for trial (R. 325-333, 337-347, 359-360, 365, 428-441). Petitioners repeatedly rejected this advice. The cases were eventually set for trial on February 18, 1975. Petitioners were accompanied at the hearing by Karl Bray who represented himself as an attorney admitted to practice in Massachusetts. Bray requested, and was granted, a continuance in order to familiarize himself with the case and because the court deemed it important that petitioners have an attorney to assist them (R. 462-466). Subsequent to the February 18, 1975 hearing, it was brought to the court's attention that Mr. Bray was not admitted to practice in Massachusetts and was in fact not a lawyer (R. 473-477). On May 13, 1975, the trial commenced. Petitioners were assisted by Bray and an attorney named Friedland, who had been retained on the eve of trial and who conceded that, because of his late entry into the case, he could offer no meaningful representation. On the second day of trial, the court again asked petitioners to proceed with their burden of proof, but they refused entirely to put on any evidence, explaining that on the eve of trial they could not collect their books and records. Instead, petitioners restated their arguments that the burden of proof was on the government and that their constitutional rights were abridged (R. 497-538). Ultimately, the Tax Court dismissed the cases for failure to prosecute (R. 540-544).

Although petitioners sought review (R. 578), they failed to prosecute their appeal; accordingly, the court of appeals dismissed their cases. In response to petitioners' motion to vacate that order, the court of appeals reinstated the appeal and heard oral argument by

petitioners' new counsel. On March 7, 1979, petitioners advised the court of appeals that they had discharged their new attorney and once again elected to represent themselves. The court of appeals affirmed (79-290 Pet. App. A-2-A-3).

1. Petitioner Elmer Thomassen contends (79-290 Pet. 6-16) that this Court should exercise its supervisory powers and remand the case for further proceedings to prevent a miscarriage of justice because only through a "cruel trick of fate" were they prevented from producing their books and records (79-290 Pet. 15). He asserts (79-290 Pet. 6) that they are now ready to reconstruct their records and that the government would not be prejudiced if they were given a second chance to establish their case (79-290 Pet. 12, 15-16). But it is well established that a trial court has discretion to dismiss a suit when the moving party fails properly to prosecute the action he initiated. *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962); *Montgomery* v. *Commissioner*, 367 F. 2d 917 (9th Cir. 1966).

Throughout these proceedings, the Tax Court was generous and patient to an excess in explaining to petitioners the requisite contents of a petition and the character of proof that would be required to put on a *prima facie* case. Petitioners, however, rejected this assistance. The court again gave them ample opportunity on three different trial dates to advance their case for a redetermination of income tax deficiencies and repeatedly urged them to present their proof. However, they again rejected the Tax Court's suggestion. As the court of appeals correctly noted (79-290 Pet. App. A-3):

> We accept appellate counsel's assurance that the taxpayers are now ready to cooperate with the Government. Unfortunately for the taxpayers, however, their decision to operate within the system comes too late. We have conscientiously examined the full record, and we are unanimously of the opinion that there exists neither any legal nor equitable basis to vacate the dismissals entered by the Tax Court.

2. For the first time, Joan Thomassen argues (79-286 Pet. 9-23) that she was deprived of property without due process because the Tax Court and court of appeals permitted her husband, who was not an attorney, to represent her (79-286 Pet. 9-23). But the cases prohibiting a person not admitted to the bar to represent another do not support Joan Thomassen's claim. Both petitioners signed all of the petitions and amended petitions filed in the Tax Court, the notice of appeal and the briefs in the court of appeals. In seeking reconsideration by the Tax Court of the dismissal of that petition, Joan Thomassen filed an affidavit declaring her recognition of the need for professional assistance in the preparation of their cases (R. 157-158). The Tax Court thereafter vacated its order of dismissal and petitioners' new attorney filed the only acceptable pleading in this case. Petitioners, however, refused his subsequent advice and, in due course, the attorney withdrew. In 1975, Joan Thomassen executed a power of attorney authorizing her husband to represent her "in any and all court proceedings pertaining to said income tax years 1964 three 197 [*sic*]" (79-286 Pet. App. A13-A15). Even in the court of appeals, Mrs. Thomassen and her husband elected to discharge their lawyer and represent themselves. In these circumstances, Joan Thomassen can hardly complain (79-286 Pet. 7) that she was an unwitting party to these proceedings or that "Dr. Thomassen's representation * * * was grossly inadequate, improper and bizarre."

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10

see

79

290